Scripps Health d/b/a Scripps Memorial Hospital Encinitas *and* California Nurses Association. Cases 21–CA–36585, 21–CA–36762, and 21–CA–36870

May 15, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On November 10, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as explained below and to adopt the recommended Order as modified.

The judge found that in March 2005, the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from talking about the Union at the nurses' station. The judge also found that this unfair labor practice warranted setting aside a January 2005 settlement agreement. Turning to the presettlement conduct, the judge found that in October 2004, the Respondent violated Section 8(a)(1) by promulgating rules discriminatorily prohibiting employees from discussing the Union. Finally, the judge dismissed the complaint allegation that the Respondent changed its bulletin board policy in violation of Section 8(a)(5).

Although we affirm the judge's unfair labor practice findings, we do not adopt her entire rationale. To the extent our reasoning differs from that of the judge, it is set forth below.

I. THE ALLEGED POSTSETTLEMENT UNFAIR LABOR PRACTICE

On March 29, 2005, emergency room nurse Chris Lind and his supervisor, Sue Flanagan, were discussing one of Lind's patients. As they were finishing their conversation, Renee Menard, another emergency room nurse, approached Lind to tell him about an upcoming union meeting. When Menard began to tell Lind about the meeting, Supervisor Flanagan declared, "that does not belong here," and motioned Menard away with a dismissive gesture. When Menard attempted to respond, Flanagan repeated her admonition and again motioned Menard away. The record establishes that the Respondent allowed other nonwork-related social conversation to take place during working time at the nurses' station.

In analyzing whether the Respondent's conduct violated Section 8(a)(1) of the Act, the judge combined legal principles applicable to no-solicitation rules with those applicable to no-talking rules. We disagree with the judge's reasoning in this respect. The credited testimony does not establish that Menard was engaged in solicitation when Flanagan told her, "that does not belong here." Rather, Menard was simply engaging in talk about the Union. Therefore, we shall analyze Flanagan's conduct under the principles applicable to no-talking rules.

It is well settled that "an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. . . ." *Jensen Enterprises*, 339 NLRB 877, 878 (2003). Further, in considering whether communications from an employer to its employees violate the Act, "the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

Applying those principles here, we find that the Respondent violated Section 8(a)(1) of the Act. The record clearly establishes that social discussions were allowed at the nurses' station during working time. Therefore, we find that when Flanagan told Menard, "that does not belong here," her statement constituted a discriminatory prohibition on discussing the Union.

In its exceptions, the Respondent renews its contention that Flanagan only meant to keep Lind focused on the patient she and Lind were discussing. As found by the judge, the credited evidence does not support the Respondent's argument.[2] Rather, the credited evidence

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge literally stated that the credible testimony "does" support the Respondent's argument. Given the judge's conclusions, we find the judge inadvertently omitted the word "not." Accordingly, we correct

establishes that Flanagan did not ask Menard to talk to Lind later, nor did Flanagan ask Menard to stop distracting Lind from his work. Either of those approaches reasonably would have been understood as merely curbing social discussions during a busy period. Instead, Flanagan said, "that does not belong here," a remark that would reasonably be interpreted to mean that discussion of the Union was not allowed at any time at the nurses' station, even though other nonwork conversation was permitted there.[3]

Accordingly, for all of the above reasons, we find the Respondent's prohibition on union talk at the nurses' station violated Section 8(a)(1) of the Act.

II. WHETHER THE SETTLEMENT AGREEMENT WAS PROPERLY SET ASIDE

The Board has long held that "a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed." *Twin City Concrete*, 317 NLRB 1313 (1995), quoting *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1998), enfd. 914 F.2d 1442 (10th Cir. 1990).

Here, pursuant to the terms of the January 2005 settlement agreement, Respondent agreed that it would not "establish and enforce a rule prohibiting [its] employees from talking about the Union during worktime, while allowing other nonwork-related discussions by [its] employees," and that it would not in "any way like this, get in the way of [the employees'] right to engage in protected activity." However, as discussed above, on March 29, 2005, the Respondent discriminatorily prohibited employees from discussing the Union. Thus, we conclude that the Respondent's postsettlement unfair labor practice breached the basic terms of the settlement agreement and that the breach warrants setting aside the settlement agreement for noncompliance.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Scripps Health d/b/a Scripps Memorial Hospital Encinitas, Encinitas, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Prohibiting employees from talking about the Union while allowing other nonwork-related discussions by employees."

2. Delete paragraph 1(b) and reletter the subsequent paragraph.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 15, 2006

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Robert J. Battista, Chairman

_____
Peter C. Schaumber, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from talking about the Union while allowing other nonwork-related discussions by employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the October 15, 2004 memorandum insofar as it unlawfully seeks to prohibit employees from

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the judge's decision at sec. V,A,3, par. 4 to read that the credible testimony "does not" support the Respondent's argument.

[3] Chairman Battista notes that the conversation occurred during worktime and was during a discussion about a patient. In these circumstances, an employer may be able to distinguish among different kinds of conversations, e.g., those that might be controversial and/or long and those which are not. If a given union conversation falls within these categories, the employer may be able to put a stop to it. However, the instant conversation involved only one employee telling another about an upcoming union meeting. It was not prolonged and it did not entail a conversation about the merits/demerits of the Union.

[4] No party has excepted to the judge's finding that the Respondent's presettlement conduct violated Sec. 8(a)(1) of the Act.

engaging in communications protected by Section 7 of the Act and WE WILL notify employees in writing that it has been rescinded.

SCRIPPS HEALTH D/B/A SCRIPPS MEMORIAL HOSPITAL ENCINITAS

Steve L. Hernandez, Esq., for the General Counsel.
Michael Goldstein, Esq. (Musick, Peeler, and Garrett, LLP), of Universal City, California, for the Respondent.
M. Jane Lawhon, Esq., of Oakland, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

Lana H. Parke, Administrative Law Judge. This matter was tried in San Diego, California, on September 26, 2005, upon an order revoking settlement agreement in Case 21–CA–36585, second order consolidating cases, amended consolidated complaint and amended notice of hearing (the complaint) issued August 16, 2005,[1] by the Regional Director for Region 21 of the National Labor Relations Board (the Board) based upon charges filed by California Nurses Association (the Union). The complaint alleges Scripps Health d/b/a Scripps Memorial Hospital Encinitas (Respondent or the Hospital) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Whether Respondent unilaterally eliminated the Union's right of access to union bulletin board space.

2. Whether Respondent, by memorandum dated October 15, 2004, promulgated rules discriminatorily prohibiting employees from discussing the Union during working time, during nonworking time, and in nonpatient care (nonworking) areas of Respondent's facilities.

3. Whether Respondent unlawfully informed an employee that she was prohibited from talking about the Union at work.

4. Whether Respondent unlawfully informed an employee that she was prohibited from talking about the Union at the nursing station.

III. JURISDICTION

At all relevant times, Respondent, a California nonprofit corporation, with facilities located at 320 and 354 Santa Fe Drive, Encinitas, California (Respondent's facilities) has been engaged in the operation of a hospital. During a representative 12-month period ending May 31, Respondent derived gross revenues in excess of $250,000 and purchased and received at its Encinitas facilities goods valued in excess of $5000, directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

IV. FINDINGS OF FACTS

A. 8(a)(1) Allegations

The second floor of Respondent's hospital is the patient rehabilitation floor. It comprises patient rooms, an employee lounge, rest rooms, a dining room, a semi-walled off area with a table where nurses perform charting duties and rehabilitation therapists may do paper work, and a physical therapy gymnasium where employees may eat lunch while patients are in the dining room or exercise after therapy hours end at 6 p.m. Patients are not allowed into the employee lounge, and ambulatory or wheelchair-capable patients go into the dining room only at specified meal times unless taken there by staff to calm a patient's agitation. The dining room contains a television, and hospital employees may eat or take breaks there and watch television. The employee lounge has four bulletin boards.

In late 2003, the Union successfully conducted a representation campaign among Respondent's full-time, regular part-time, and per diem registered nurses at Respondent's facilities, and, on January 9, 2004, the Board certified the Union as the collective-bargaining representative among those employees in Case 21–RC–20694. Following a decertification petition filed in 2005, the Board conducted an unsuccessful decertification election among these same employees on July 27 and 28, 2005. Thereafter, on August 9, 2005, the Board again certified the Union as the collective-bargaining representative among the said employees.

1. The October 15, 2004 memorandum

Respondent posted a memorandum dated October 15, 2004, from Diane Romito, Respondent's director of rehabilitation services, to the rehabilitation staff, on a lounge bulletin board. The memorandum stated:

> It has come to my attention that staff is meeting to discuss issues related to union negotiations on company time and in patient care areas. Derogatory statements have been overheard by patients.
>
> While open discussions are always welcome on the rehab unit, and controversy often precedes change, I am reminding you all that these discussions are not allowed on patient care units (including the employee lounge, the dining room, the charting areas, the gym) nor are they allowed during work hours when patient care should be the focus.
>
> This is the current Scripps policy and we will continue to follow these directives. Further infractions will be subject to disciplinary action.
>
> There is certainly opportunity for discussion during staff mealbreaks or other "off the clock" times. The main hospital lobby and the main cafeteria are appropriate meeting areas. However, in any instance, I would ask you to be

[1] All dates herein are 2005 unless otherwise specified.

[2] Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

aware of your impact on patients and families who may overhear your conversations.

2. The March 7, 2004 conversation between Barbara Ray and Diane Jackson

In early March, Diane Jackson (Jackson), who terminated employment with Respondent in June, worked as a floor nurse in the medical surgical area of the hospital. Barbara Ray (Ray) was her supervisor. Sometime in early March, Jackson obtained a flyer from Respondent to its employees stating Respondent's hope that the Union would respect Respondent's property lines and the needs of patients during an upcoming union-sponsored candlelight vigil. According to Jackson, as she read the flyer while standing in the doorway of the charge nurse office, Ray called her into the office and told her to keep her comments and opinions about the Union to herself, saying she needed to focus on patient care. Jackson indignantly told Ray that her patients were well cared for and left.

Ray's version of the conversation differed significantly from that of Jackson. According to Ray, she saw Jackson walk into the lead nurse's office and pick up and read a copy of a memo, which Ray had been instructed to pass out to employees. When Ray asked Jackson what she was reading, Jackson said, "Something from you guys," adding, "Oh that Carl Etter [hospital CEO], he is so full of bullshit."

Ray told Jackson that she knew employees had hurt feelings and frustrations, but they needed to put them aside and focus on patient care. Jackson ripped up the memo and threw it in the trash, saying, "I take good care of my patients."

Ray agreed, saying, "Yes, you do, Diane; you are an excellent nurse."

Jackson said, "Then do not tell me I cannot talk about the Union."

Ray denied that she had given any such directive, saying, "If that is what you think, then I apologize."

Shortly thereafter, Jackson received a telephone call from her daughter. Jackson told her daughter she could not speak to her because she needed to focus on her patients. Overhearing the conversation, Ray told Jackson she needed to talk to her. Jackson refused, saying she needed to focus on her patients. Ray touched Jackson's arm.[3] Jackson told Ray not to touch her. According to Jackson, she went with Ray to her office and told Ray she could get into trouble for telling her not to talk about the Union. Ray denied having done so and apologized for any misunderstanding.

Again, Ray's version differs from Jackson's. According to Ray, when Jackson objected to Ray touching her, Ray held up her hands in a gesture of surrender and said no more.

I credit Ray's account. I found her to be a slight, mild-voiced witness, who remained calm and soft-spoken even under rigorous cross-examination by counsel for the Charging Party. Jackson, on the other hand, displayed a hostile manner that comported with Ray's account of their interchange. Moreover, Jackson's account of her initial conversation with Ray lacks inherent cohesion. According to Jackson, Ray told her not to talk about the Union at a time when Jackson was silently reading a management memo. Jackson neither recounted any preceding statement or action that would set Ray's alleged admonitions in context nor evinced surprise at their abruptness. Ray's account, on the other hand, is intrinsically plausible.

3. The March 29, 2005 conversation between Sue Flanagan and Renee Menard

Renee Menard (Menard), emergency department nurse, and Chris Lind (Lind), testified of an interchange between Menard and their supervisor, Sue Flanagan (Flanagan) in late March. Menard approached Lind as he spoke with Flanagan in the emergency room nursing station about a patient.[4] Menard handed Lind a sign-up paper for volunteers to work on the Union's picket line, asked him to get signatures from his shift and then put the paper in another nurse's locker, and said something about an upcoming union meeting.[5] According to Menard, Flanagan told Menard she was not allowed to speak about the Union at the nursing station, whereupon Menard affirmed her right to do so and left the nursing station. According to Lind, when Menard spoke to him, Flanagan said, "That does not belong here," and motioned Menard away with a dismissive gesture. When Menard tried to respond, Flanagan repeated her admonition and motioned Menard away again. Lind observed Flanagan's manner to be unprecedentedly angry and hostile.

Flanagan's version of the conversation differs from Menard and Lind's. According to Flanagan, on the night of her exchange with Menard, the emergency room was very busy with all nine beds filled and many people waiting to be seen. When Menard approached them, Flanagan and Lind were seated at the nurse's station where Lind was reporting on a patient whom Flanagan was anxious to move to the intensive care unit, both for the patient's well-being and to free up an emergency room bed. Flanagan testified that she and Lind had barely finished their discussion[6] when Menard spoke to Lind, and he responded. Flanagan said, "This is not the time or place. Chris needs to get this patient to ICU." According to Flanagan, she paid no attention to what Menard and Lind were talking about, although she was aware it had something to do with a meeting at a restaurant.[7] She did not care what they were talking about; she only cared that they were talking. When Menard pointed out that employees were permitted to talk about union business at the desk, Flanagan said she responded, "I never said otherwise, but Chris needs to focus on his patient."

General and personal conversation is permitted at the nurse's station as long as it doesn't interfere with patient care.

[3] Jackson testified that Ray "grab[bed]" her arm to "pull [her] toward the office." I credit Ray's account.

[4] Although Lind testified in direct examination that he and Flanagan had just concluded their conversation when Menard spoke to him, under cross-examination, he agreed that he was discussing his patient with Flanagan when Menard approached.

[5] Menard and Lind's testimony differs somewhat as to what Menard said. I have set forth an amalgam of their testimony.

[6] Flanagan immediately qualified her testimony by stating that she was not sure she and Lind had finished speaking. In light of both her and Lind's testimonies, it is reasonable to conclude that the two were finishing their conversation when Menard approached.

[7] Flanagan was perhaps a little disingenuous here, and I find she was aware Menard was talking about union-related matters.

B. 8(a)(5) Allegations

During a relevant period, Melissa Clark (Clark), registered nurse in Respondent's medical/surgical telemetry department located on the second floor (2 South), served on the Union's bargaining team during negotiations between Respondent and the Union. On March 29, 2004, the parties reached tentative agreement regarding a bulletin board to be maintained at the Hospital for union use, as follows:

> The Hospital shall make space available on a bulletin board located immediately outside the cafeteria[8] for posting of official union business, but not the Union's campaign materials or the campaign materials of any other union. No material shall be posted until approved for posting and initialed by the Human Resources Director or designee. Posted material shall bear the date and identity of the Union. Posted material shall not be controversial, misleading, contain any deliberate misstatements, or violate any federal, state or county laws. . . .

After the tentative agreement was reached, Clark asked her supervisor, Clela Patterson (Patterson) if the Union could utilize a bulletin board in the nurse's staff lounge to post information regarding contract negotiations. Patterson agreed, designating one of the four bulletin boards in the lounge for that purpose (the CNA bulletin board).[9] According to Patterson, she understood the bulletin board was to be used for posting both anti and prounion material.

Clark placed the words "CNA News" at the top of the board. Thereafter Clark posted union news items on the board. Patterson and other unknown individuals also posted antiunion information and rhetoric, including, at some later time, decertification election information and decertification campaign flyers. Sometimes Clark removed the antiunion postings.

Following a 1-day strike conducted in April, employees complained to Anna Jackson (Jackson), Respondent's manager of 2 South, that antiunion material was being removed from the CNA bulletin board. Thereafter, at an April 28 staff meeting, Jackson told employees that it had been brought to her attention that people were removing items from the CNA bulletin board. She expressed concern that employees were not respecting others' opinions, stating that the CNA bulletin board was for the posting of opinions and information regarding the Union generally and was to be shared.

At about the same time, the following notice (the CNA bulletin board division notice) appeared on the CNA bulletin board:

> Half of this bulletin board has been assigned to you for communication. Please respect all employees' opinions and rights to these opinions.
>
> Thank you
> A. Jackson
> 4/2005

Thereafter, union oppositional information and flyers were posted below the notice, while union supportive materials were posted above.[10] Although Clark no longer had sufficient space on the bulletin board to post materials without overlapping them, she was not prevented from posting any material she wished. Prior to the April 28 staff meeting and the posting of the CNA bulletin board division notice, Respondent had not discussed division of the bulletin board with the Union. Following the unsuccessful decertification election of July 27 and 28, the CNA bulletin board division notice was removed from the CNA.

V. DISCUSSION

A. 8(a)(1) Allegations

1. Legal principles

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). However, "an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997).

In considering no-solicitation rules, the Board applies the analysis set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004):

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827.

The Board begins its analysis with "the issue of whether the rule explicitly restricts activities protected by Section 7. If it does [the Board] will find the rule unlawful." If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, supra, slip op. 1–2; *Guardsmark LLC*, 344 NLRB No. 47, slip op. 2 (2005); *Palms Hotel & Casino*, 344 NLRB No. 159 (2005).

Union discussion or solicitation engaged in at work on an employee's own time is protected activity, which an employer may not prohibit. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). While a rule prohibiting solicitation or distribution

[8] The cafeteria is located on the ground floor of the Hospital.

[9] Although Patterson could not clearly recall the circumstances, she testified that she discussed the matter with someone "higher up," who okayed the use of a bulletin board for the posting of union information.

[10] Following the April 28, 2004 staff meeting, Clark no longer removed antiunion material from the CNA bulletin board.

during "working time" is presumptively valid, since it implies solicitation is permitted during nonworking time, a rule which prohibits solicitation during "working hours" is presumptively invalid, because the term "working hours" connotes periods of time, such as breaks and lunch, which are the employees' own time.[11] Prohibition of solicitation during "company time" is also presumptively invalid because it "could reasonably be construed as encompassing both working and nonworking time spent on the company premises,"[12] as is also a restriction on solicitation while employees are "on the clock."[13]

With regard to health care facilities, the Board's policy is that an employer's "ban on employee solicitation be limited to immediate patient care areas." *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980). "Restrictions on solicitation, during nonworking time, or distribution of literature, during nonworking time and in nonworking areas, however, are presumptively unlawful even with respect to areas that may be accessible to patients [citation omitted]." *Brockton Hospital*, 333 NLRB 1367, 1368 (2001). These presumptions have been upheld by the Supreme Court as consistent with the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).

1. The October 15, 2004 memorandum

Applying the above principles to the October 15, 2004 memorandum, it is clear that the rules Respondent announced therein are facially overbroad and violate Section 8(a)(1) of the Act. The stated rules broadly prohibit employee discussions regarding union negotiations while "on patient care units" without limiting the restriction to immediate patient care areas. Indeed, Respondent specifies that union discussions are not allowed in the employee lounge (from which patients are excluded), the dining room and the gym (which employees utilize for breaks when not open for patient use), and the charting areas (where no patient care is given). Respondent relegates such discussions to the "main hospital lobby and the main cafeteria." Hence, the rule goes well beyond a lawful curtailing of employee union dialogue in shielded "immediate patient care" areas. The fact that the areas banned by Respondent may be accessible to patients does not alter the presumptive unlawfulness of the restrictions. *Brockton Hospital*, supra at 1368.

Moreover, the October 15, 2004 memorandum prohibits union discussion "during work hours when patient care should be the focus" and, inferentially, during other than "off the clock" times,[14] both of which restrictions are also presumptively invalid. Accordingly, by its October 15, 2004 memorandum, Respondent unlawfully promulgated limitations on protected employee communications in violation of Section 8(a)(1) of the Act.

Respondent argues that an informal settlement agreement approved by the Regional Director on January 20 resolved all issues relating to the October 15, 2004 memorandum and that revocation of that agreement is improper as Respondent did not breach any of the terms of the settlement agreement. A settlement agreement may be set aside if there has been a failure to comply with the provisions of the settlement or if postsettlement unfair labor practices are committed. See *Trus Joist Macmillan*, 341 NLRB 369 fn. 11 (2004). As discussed below, I have found Respondent committed a postsettlement unfair labor practice by Flanagan's restriction on Menard's union-related communication to Lind. Therefore, the Regional Director was entitled to revoke the settlement agreement.

2. The March 7, 2004 conversation between Barbara Ray and Diane Jackson

Paragraph 9(b) of the complaint alleges that on about March 7, 2004, Supervisor Barbara Ray told an employee that she was prohibited from talking about the Union at work in violation of Section 8(a)(1) of the Act. This allegation refers to the above-detailed conversation on that date between Ray and Jackson. Having credited Ray's account of her March 2004 conversation with Jackson, I find that Ray did nothing more than tell Jackson that she should put aside her hurt feelings, presumably stemming from the union controversy in the hospital, and focus on patient care. Jackson may have inferred from the suggestion that Ray was directing her to limit conversations about the Union and attributing diminished quality of patient care to a preoccupation with the Union, and Ray may even have intended some such implication. But, as noted above, Ray's communication must be viewed objectively to determine "whether the remark tends to interfere with the free exercise of employee rights." The Board will consider neither the motivation behind the remark nor its actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

Viewed objectively, Ray's remark constitutes merely a mild reminder that patient care should be of paramount concern to Jackson without, in any way, restricting her protected right to talk about the Union. Such a proposition is both reasonable and lawful. Accordingly, I find Ray did not inform Jackson that she was prohibited from talking about the Union at work and did not violate Section 8(a)(1) of the Act.

3. The March 29, 2005 conversation between Sue Flanagan and Renee Menard

Paragraph 9(c) of the complaint alleges that on about March 29, 2005, Supervisor Sue Flanagan told an employee that she was prohibited from talking about the Union at the nursing-station desk in violation of Section 8(a)(1) of the Act. This allegation refers to the above-detailed conversation on that date between Flanagan and Menard.

Three individuals, Menard, Lind, and Flanagan, were parties to the conversation and, not surprisingly, there are three different versions of what was said. Menard recalled that Flanagan told her she was not allowed to speak about the Union at the nursing station. Lind recalled that Flanagan told Menard "that" did not belong at the nursing station ("that" being, inferentially, Menard's communication to Lind about the Union). Flanagan recalled telling Menard, essentially, that both the timing and setting of her message delivery was inappropriate, as Lind needed to focus on his patient.

[11] *Our Way, Inc.*, 268 NLRB 394, 395 (1983).
[12] *Litton Systems*, 300 NLRB 324 (1990).
[13] *Burger King*, 331 NLRB 1011 (2000).
[14] Since the memorandum points out that employees have opportunity for discussion during "staff mealbreaks or other 'off the clock' times," it follows that employees may reasonably infer an intention to restrict their protected discourse while "on the clock."

In resolving this inconsistent testimony, I give greatest weight to Lind's account. As the least personally involved of the three parties, his recollection may reasonably be expected to be the most dispassionate and hence the most reliable. Consequently, I accept Lind's testimony that Flanagan twice told Menard that her communication about the Union did not belong at the nursing station. I do not accept Flanagan's testimony that she disavowed any intention of restraining union discussion at the nurse's station, which statement neither Menard nor Lind recalled.

I have carefully considered Respondent's argument that Flanagan's comments were intended merely to curb any nonwork interchanges during a particularly hectic and stressful period in the emergency room. The credible testimony does support the argument. Flanagan did not ask Menard to speak to Lind later or not to distract him from his work duties at that time, or give any similarly limited and neutral direction. Rather she clearly communicated her view that union discussion did not belong at the nursing station. Since the nursing station is not an "immediate patient care" area and since nonwork conversation is otherwise permitted there, Flanagan's restriction on Menard's union-related communication to Lind violated Section 8(a)(1) of the Act.

B. 8(a)(5) Allegations

Regarding bulletin board postings, the Board has stated:

> The legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well established. In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items . . ., it may not "validly discriminate against notices of union meetings which employees also posted." Moreover, in cases such as these, an employer's motivation, no matter how well meant, is irrelevant. [Footnotes omitted.][15]

Further, bulletin board matters are mandatory subjects of bargaining. *ATC/Vancom of California, L.P.*, 338 NLRB 1166 (2003); *RCN Corp.*, 333 NLRB 295 (2001); *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991). Hence, an employer may not unilaterally change its bulletin board posting policy established on a union's behalf.

Here, on March 29, 2004, Respondent and the Union reached a tentative agreement during negotiations to make bulletin board space available for the Union's use outside the cafeteria on the Hospital's ground floor. Respondent was not required to establish the tentatively agreed to bulletin board at that time, and it did not. However, Respondent acceded to the request of Clark, employee member of the Union's bargaining team, that bulletin board space be made available for Union use. The bulletin board so designated was located in the staff lounge on the Hospital's second floor. There is no evidence that any specific agreement was reached to limit the bulletin board to union-generated postings. However, Clark believed the board was reserved for union use, exclusive of other postings, while her supervisor, Patterson, understood both anti and prounion postings were permitted. While the evidence is not entirely clear, it appears that both union proponents and opponents posted material on the board as soon as it was labeled "CNA News."

The General Counsel argues that by granting the Union bulletin board space, Respondent reserved the board for the exclusive use of the Union, and any unilateral retrenchment from that grant violated Respondent's duty to bargain with the Union. Respondent, on the other hand, argues that the Hospital's intention was to allow all employees to post union-related material regardless of perspective.

There is no evidence Respondent agreed to make the entire CNA bulletin board the exclusive province of the Union. Therefore, when Respondent divided the board, it did not renege on its agreement to provide bulletin board space for union postings, nor did Respondent cancel or limit any of the Union's posting privileges.[16] Respondent merely directed its employees to respect postings of both pro and antiunion factions. While the Board prohibits an employer from imposing discriminatory content-based restrictions on bulletin board space utilized by employees, the Board also recognizes an employer's interest and obligation in ensuring fairness in bulletin board space allocation:

> [If bulletin board postings create] a battleground between competing factions of employees that would require the employer to police the bulletin board to ensure fairness in space allocation between the factions, then restrictions may be permissible [citation omitted].[17]

Inasmuch as Respondent's division of the CNA bulletin board did not prevent the Union from posting any information it chose, and as Respondent's action was not discriminatory but reasonably calculated to promote employee harmony, Respondent did not effect any material change to the CNA bulletin board and did not violate Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by

(a) Through its October 15, 2004 memorandum, promulgating and maintaining overly broad and discriminatory rules prohibiting employees from discussing the Union during working time, during nonworking time, and in nonworking areas.

(b) Informing Renee Menard that she was prohibited from talking about the Union at the nursing station, which is not an immediate patient care area.

2. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist

[15] *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); see also *Johnson Technology, Inc.*, 345 NLRB No. 47 (2005).

[16] I do not consider the resultant abridgment of the space the Union had formerly enjoyed to constitute a restriction on its posting privileges.

[17] *Vons Grocery Co.*, 320 NLRB 53, 55 (1995).

and to take certain affirmative action designed to effectuate the policies of the Act. The General Counsel requests that the order herein include a special remedy requiring Respondent to read the notice to employees. Although Respondent committed a postsettlement unfair labor practice, the incident was isolated and directly affected only two employees. The relatively minor incident does not provide a basis for the extraordinary remedy the General Counsel requests. See *Yellow Ambulance Service*, 342 NLRB No. 77 (2004). Therefore, I deny the request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Scripps Health d/b/a Scripps Memorial Hospital Encinitas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining any overly broad and discriminatory rules prohibiting employees from discussing the Union during working time, during nonworking time, and in nonworking areas.

(b) Informing any employees that they are prohibited from talking about the Union at locations other than immediate patient care areas.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the October 15, 2004 memorandum insofar as it unlawfully seeks to prohibit employees from engaging in communications protected by Section 7 of the Act and notify employees in writing that it has been rescinded.

(b) Within 14 days after service by the Region, post at its facilities in Encinitas, California, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 15, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT announce and maintain any overly broad and/or discriminatory rules prohibiting our employees from discussing the California Nurses Association (the Union) or any other labor organization during working time, during nonworking time, and in nonworking areas.

WE WILL NOT tell any employees that they are prohibited from talking about the Union or any other labor organization at locations other than immediate patient care areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our memorandum dated October 15, 2004 from Diane Romito to the rehabilitation staff insofar as it unlawfully seeks to prohibit employees from discussing the Union or any other labor organization during working time, during nonworking time, and in nonworking areas, and WE WILL notify you in writing that this has been done.

SCRIPPS HEALTH D/B/A SCRIPPS MEMORIAL HOSPITAL ENCINITAS

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."